No. 75-1622

In the Supreme Court of the United States

OCTOBER TERM, 1976

BATON ROUGE MARINE CONTRACTORS, INC., PETITIONER

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL MARITIME COMMISSION AND THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-19) is reported at 530 F. 2d 1062. The report and order of the Federal Maritime Commission (Pet. App. B-1 to B-69) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1976. The petition for a writ of certiorari was filed on May 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

QUESTION PRESENTED

Whether a lease agreement previously approved by the Federal Maritime Commission authorizes the lessee to impose charges against stevedores using its grain loading facilities and services.

STATUTE INVOLVED

Section 15 of the Shipping Act of 1916, 39 Stat. 733, as amended, 46 U.S.C. 814, is set forth at Pet. App. C-1 to C-3.

STATEMENT

Intervenor Cargill, Inc. (Cargill) operates a grain terminal facility in Baton Rouge, Louisiana, pursuant to a lease agreement with the Greater Baton Rouge Port Commission (Port), which granted Cargill the exclusive right to operate a public grain elevator within the port area (Pet. App. A-7). The Federal Maritime Board, predecessor of the Federal Maritime Commission (the "Commission"), approved that lease agreement in 1959 pursuant to Section 15 of the Shipping Act of 1916, 39 Stat. 733, as amended, 46 U.S.C. 814. *Agreements Nos. 8225 and 8225-1*, 5 F.M.B. 648, affirmed *sub nom. Greater Baton Rouge Port Commission* v. *United States*, 287 F. 2d 86 (C.A. 5), certiorari denied, 368 U.S. 985.

The lease provides that Cargill must operate the grain elevator and wharf "as a public port facility" (Pet. App. B-7) and maintain rates for the handling and storing of grain "on a competitive basis to rates published for similar services at New Orleans and other competitive Gulf Ports" (Pet. App. A-10, n. 9).

Petitioner Baton Rouge Marine Contractors, Inc. is a joint venture organized by four major stevedoring companies and steamship agents for the purpose of doing business at the port of Baton Rouge (Pet. App. B-4 to B-5). It has operated at the Cargill grain terminal since the terminal opened in 1955 (Pet. App. A-7). By virtue of the contacts of its parent companies, it performs most of the approximately 20 percent of the grain stevedoring work at Baton Rouge not secured by a wholly-owned Cargill subsidiary, and approximately 80 percent of the general cargo stevedoring work.

On February 4, 1971, Cargill informed petitioner and all other stevedores using its Baton Rouge facility that it would impose certain charges for use of its terminal services and facilities (Pet. App. A-8).[1] Petitioner signed an agreement to pay these charges "under protest" after Cargill threatened that it would refuse to deliver grain to vessels employing non-signing stevedores (*ibid.*).[2] Petitioner then filed a complaint with the Commission, claiming that Cargill's imposition of these charges constituted a modification of its lease with the Port which could not become effective until approved by the Commission under Section 15.[3]

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[1]Cargill had not previously charged stevedores for their use of the Baton Rouge terminal. It initially charged stevedores for the use of terminal services and facilities at its Port of Houston grain elevator, which opened in 1967 (Pet. App. A-8, n. 5; B-8 to B-10). In 1970, four other Louisiana grain terminals instituted similar charges (Pet. App. B-10).

[2]The Port wrote a letter of protest to Cargill, and its representative testified in the Commission proceeding that the charges adversely affected Baton Rouge's competitive position and thus violated the lease. However, the Port did not otherwise challenge the validity of the charges or intervene before the Commission (Pet. App. A-8; B-11 to B-12).

[3]Petitioner also alleged that these charges gave an illegal preference to Cargill, in violation of Section 16 of the Shipping Act, 46 U.S.C. 815, because Cargill employed its wholly-owned subsidiary, Rogers, as a competing stevedore, and that the charges constituted an "unreasonable practice," in violation of Section 17 of the Act, 46 U.S.C. 816, since they were not reasonably related to the benefits accruing to the stevedores from use of the facilities. The Commission rejected petitioner's Section 16 claim for lack of proof that the charges gave rise to discriminatory practices (Pet. App. B-34 to B-35), but found, with two dissents, that the charges were not reasonably related to the benefits received (Pet. App. B-36 to B-42). It remanded the proceeding to the administrative law judge to determine the proper allocation. The court of appeals affirmed the Commission's disposition of these claims (Pet. App. A-7, A-12 to A-19). No party has presented those issues to this Court for review.

The Commission, with one dissent, concluded that "[t]he charges assessed by Cargill against stevedores constitute actions taken within the lease authority and do not constitute * * * a modification of the approved agreement * * * [and thus] do not require further approval by the Commission under section 15" (Pet. App. B-34). It found that the only restrictions in the lease on Cargill's authority to establish rates for handling and storing grain were that it could not assess docking charges, which were reserved to the lessor, and that its rates must be competitive with those of New Orleans and other Gulf ports (Pet. App. B-31 to B-32). "In all other respects, relative to rates, rules, and regulations, Cargill was as free of restrictions as it would have been had it owned the facilities" (Pet. App. B-32). The Commission also found that in approving the lease under Section 15, it had imposed no conditions or restrictions on Cargill's rate-making authority (Pet. App. B-32 to B-33).

The United States Court of Appeals for the District of Columbia Circuit affirmed (Pet. App. A-1 to A-19). It held that the charges came "within the broad authority conferred by [Cargill's] Commission-approved lease with the Port and does not require specific approval under [Section] 15" (Pet. App. A-7).

ARGUMENT

Petitioner contends (Pet. 5-6) that the lease between Cargill and the Port did not authorize the imposition of charges against stevedores utilizing the Baton Rouge grain elevator facility and that Cargill's action therefore constituted a modification of that agreement which required the Commission's prior approval. In essence, it requests that this Court review the court of appeals' decision affirming the Commission's contruction of the particular language of a single contract governing the allocation of expenses in a small segment of the Gulf

Coast shipping industry. The petition thus presents no issue of general significance.[4] Moreover, the court of appeals properly concluded that the broad provisions of the lease did authorize the imposition of this charge. Further review is not warranted.

1. From the earliest days of federal maritime regulation, conventional changes in rates and regulations authorized and contemplated by an approved basic agreement uniformly have been held not to constitute new agreements or "modifications" which require separate approval by the Commission before they may become effective. See, *e.g.*, *Empire State Highway Transportation Ass'n* v. *Federal Maritime Board,* 291 F. 2d 336, 338-339 (C.A. D.C.), certiorari denied, 368 U.S. 931; *Continental Nut Co.* v. *Pacific Coast River Plate Brazil Conf.*, 9 F.M.C. 563, 570; *Agreement No. 9025: Dockage Agreement*, 8 F.M.C. 381, 384; *Empire State Highway Transp. Ass'n* v. *American Export Lines,* 5 F.M.B. 565, 585; *Ex parte 4, Section 15 Inquiry,* 1 U.S.S.B. 121, 125; cf. *Volkswagenwerk A.G.* v. *Federal Maritime Commission*, 390 U.S. 261, 276-277. The question whether imposition of a particular charge is merely a conventional rate change within the scope of the underlying approved agreement turns largely upon the Commission's expert knowledge of industry practices and the context in which its own approval was given. Therefore, the lower courts have granted the Commission reasonable leeway in delineating the scope of an agreement and thus the extent of its prior approval. *North Atlantic Westbound Freight Ass'n* v. *Federal Maritime Commission*, 397 F. 2d

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[4]Contrary to petitioner's contention (Pet. 5-9), this case presents no occasion for review of the proper scope of the immunity from the antitrust laws granted by Section 15. Since petitioner has not sought further review of its "illegal preference" claim under Section 16, no antitrust questions remain in this case. See Pet. App. A-9, n. 7.

683, 685 (C.A. D.C.); *Trans-Pacific Freight Conf.* v. *Federal Maritime Commission,* 314 F. 2d 928, 935 (C.A. 9). The Commission's determination of the scope of an agreement it previously approved will be respected if its "reading of the basic agreement involved is a tenable one." *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F. 2d 335, 342 (C.A. D.C.).

In this case, the Commission's construction of the underlying lease agreement manifestly satisfies this standard of review. The only limitations the lease imposed on Cargill's ratemaking authority were the reservation of dockage fees to the lessor and the general constraint that its charges be competitive with New Orleans and other Gulf ports.[5] Otherwise, the language of the agreement gave Cargill the same authority to set rates for those using its facilities as if it owned the facility (Pet. App. A-9; B-32). The Commission found that in approving the lease, its predecessor imposed no conditions or restrictions on Cargill's ratemaking power (Pet. App. B-32 to B-33). Therefore, the Commission correctly held that the imposition of the stevedore charge, although novel at Baton Rouge, merely implemented the authority contemplated by the lease (*ibid.*). Since promulgation of that charge did not fundamentally change the scheme of competition at the Baton Rouge facility, the court of appeals properly found that Cargill's action was not a "modification" of the agreement requiring prior Commission approval (Pet. App. A-10). See *Pacific Westbound Conference* v. *Federal Maritime Commission,* 440 F. 2d 1303 (C.A. 5), certiorari denied, 404 U.S. 881; *Empire State Highway Transportation Ass'n* v. *Federal Maritime Board, supra.*

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[5]The Commission found that the movement of grain in capacity volume through the Baton Rouge facility was persuasive evidence that Cargill's rates were competitive with other Gulf ports (Pet. App. B-32).

However, although the imposition of the stevedore charge did not require prior approval, that rate is not exempt from further Commission supervision. The Commission subsequently may, on its own motion or on complaint by an interested party, review that charge to determine whether it has been applied in compliance with the antidiscrimination provision of Section 16 and the reasonableness requirement of Section 17. In addition, the Commission has the authority to require modification or withdraw approval of the agreement. Thus, contrary to petitioner's claim (Pet. 8), the Commission retains substantial regulatory control over the Baton Rouge facility.

2. The decision below does not, as petitioner suggests (Pet. 6-9), conflict with this Court's decisions in *Volkswagenwerk* v. *Federal Martime Commission, supra,* and *Federal Maritime Commission* v. *Seatrain Lines, Inc.,* 411 U.S. 726. The question in those cases was not whether, as here, the imposition of a charge was within the scope of the previously approved agreement or was a "modification" requiring separate prior approval. The issue there was whether a particular agreement was of the kind that Congress intended to subject to the Commission's supervision and which therefore had to be filed under Section 15.[6] In the instant case, however, the Cargill lease unquestionably is within the Commission's jurisdiction.

3. Nor is the decision below in conflict with the decision in *Port of Boston Marine Terminal Ass'n* v. *Boston Shipping Ass'n*, 420 F. 2d 419 (C.A. 1). In

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[6]The agreement in *Volkswagenwerk* apportioned certain welfare labor cost between carriers and terminal operators. In *Seatrain,* the agreement provided for the purchase of all the assets of one carrier by another.

Port of Boston Shipping Ass'n v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, this Court reversed the court of appeals' decision on the ground that it had lacked jurisdiction to consider that dispute. Under the circumstances, the First Circuit's opinion is devoid of any precedential effect. See *O'Connor* v. *Donaldson*, 422 U.S. 563, 577-578 n. 12; *United States* v. *Munsingwear*, 340 U.S. 36; *Ridley* v. *McCall*, 496 F. 2d 213 (C.A. 5); *Leader* v. *Apex Hosiery Co.*, 108 F. 2d 71, 81 (C.A. 3), affirmed, 310 U.S. 469. Thus, there is no conflict among the courts of appeals on the issue presented here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1976.

DOJ-1976-07